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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re C.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. C.G., Defendant and Appellant.	D060605 (Super. Ct. No. J226597)

APPEAL from a judgment of the Superior Court of San Diego County, Browder A. Willis, III, Judge. Affirmed as modified.

C.G. was declared a ward of the court under Welfare and Institutions Code section 602 after the juvenile court found true allegations that he committed robbery, burglary, theft from a merchant, and possessed alcohol when under 21 years of age in a public place. The court ordered C.G. to the Camp Barrett program for a period not to exceed 365 days. C.G. asserts that the true finding on

the theft charge must be reversed because it is a necessarily included offense of robbery. We agree and will modify the judgment accordingly.

FACTUAL BACKGROUND

C.G. and J.G. entered a grocery store, each picked up a 12-pack of beer and started to leave the store without paying. The store manager grabbed J.G. after the minors ignored her request to see a receipt. After J.G. broke free, the minors fled and were later arrested.

DISCUSSION

California law prohibits convicting a defendant of two offenses arising from a single criminal act when one is a lesser offense necessarily included in the other. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1033.) Based on this principle, C.G. contends the juvenile court erred when it made a true finding on both the robbery and theft counts arising from one course of conduct because theft is a necessarily included offense of robbery. The Attorney General concedes that theft is a necessarily included offense of robbery, but argues that the rules against multiple convictions for necessarily included offenses do not apply to the juvenile proceedings here because the theoretical maximum length of C.G.'s confinement was not increased by the necessarily included offense. Since both parties cite the same case law to make their respective arguments, we turn to these cases.

In *In re Robert W.* (1991) 228 Cal.App.3d 32, the minor claimed the juvenile court erred when it made true findings on both robbery and assault because it violated the rule against multiple convictions based on lesser included

offenses. (*Id.* at p. 33.) The appellate court rejected this contention stating that the considerations underlying the prohibition against convicting adults of both greater and lesser offenses do not apply to juveniles as long as the theoretical maximum length of potential confinement is not increased by the aggregation of the minor's offenses. (*Id*. at p. 34.)

This issue was next addressed in *In re Jose H.* (2000) 77 Cal.App.4th 1090, where the juvenile court placed the minor on probation after sustaining a wardship petition based on findings of, among other things, battery with serious bodily injury, and assault with a deadly or dangerous weapon with force likely to produce great bodily injury, with a great bodily injury enhancement. (*Id*. at p. 1092.) On appeal, the minor claimed that by committing a felony assault with great bodily injury, he necessarily committed a battery with serious bodily injury. (*Id*. at p. 1093.) After acknowledging the general principle that multiple convictions may not be based on necessarily included offenses, the appellate court rejected the minor's claim because this rule applied to offenses, not offenses as enhanced by additional allegations. (*Id*. at p. 1095.)

In *In re Marcus T*. (2001) 89 Cal.App.4th 468, the appellate court concluded that where two crimes are based upon the commission of the same act, and one is a lesser and necessarily included offense of the other, a minor may not be found guilty of both. (*Id*. at p. 471.) However, after analyzing the minor's crimes under the statutory elements test, the appellate court concluded that the crime of terrorist threats in violation of Penal Code section 422 was not a lesser

included offense of the crime of threatening a public officer in violation of Penal Code section 71 (*id*. at p. 472), but remanded the matter to the juvenile court to determine whether under the accusatory pleadings test, the minor's act of threatening a public officer in violation of Penal Code section 71 was a lesser included offense of his terrorist threat in violation of Penal Code section 422. (*Id*. at pp. 472, 475.)

Finally, in *In re Edward G*. (2004) 124 Cal.App.4th 962 (disapproved by *People v. Licas* (2007) 41 Cal.4th 362), the juvenile court found true allegations that the minor discharged a firearm from a vehicle at a person outside the vehicle (count 1) and committed an assault with a firearm (count 2). (*In re Edward G.*, *supra*, at p. 966.) After applying the statutory elements test, the appellate court concluded that count 2 must be reversed because it was an offense necessarily included in the offense charged in count 1. (*Id*. at pp. 967, 971.)

In all of these cases, except *In re Robert W.*, the appellate court accepted the notion that the rules against multiple convictions for necessarily included offenses apply to juvenile proceedings. We reach the same conclusion. *In re Robert W*. is an anomaly as it was decided in 1991, before the enactment of the three strikes law in 1994. (*People v. Jennings* (1999) 70 Cal.App.4th 899, 902, fn. 3.) The subsequently enacted three strikes law makes clear that a juvenile adjudication qualifies as a strike "[n]otwithstanding any other provision of law." (Pen. Code, § 1170.12, subd. (b)(3); see also Pen. Code, § 667, subd. (d)(3).) Thus, after enactment of the three strikes law, true findings against a minor on two

crimes that constitute strike offenses could have dramatic future consequences if the necessarily included offense is not stricken. Accordingly, we turn to the Attorney General's argument that the rule against multiple convictions for necessarily included offenses should not apply in this case because the theoretical maximum length of C.G.'s confinement was not increased by the necessarily included theft offense.

The Attorney General relies on *In re Robert W.* to support its assertion; however, as we have already noted, this case was decided before enactment of the three strikes law. Additionally, the Attorney General's attempt to distinguish *In re Jose H.* is misplaced. In *In re Jose H.*, the appellate court accepted the notion that the rules against multiple convictions for necessarily included offenses apply to juvenile proceedings even where the length of confinement could not be increased by the necessarily included offenses because the minor was on probation. (*In re Jose H.*, *supra*, 77 Cal.App.4th at pp. 1092, 1095.) Moreover, the other cases decided after enactment of the three strikes law did not engage in the Attorney General's proposed analysis that a necessarily included offense should only be stricken if not doing so would increase the theoretical maximum length of the minor's confinement. (See *In re Edward G.*, *supra*, 124 Cal.App.4th at p. 967; *In re Marcus T.*, *supra*, 89 Cal.App.4th at p. 471.) We too decline to engage in this analysis. Accordingly, we conclude that because C.G.'s act of robbery necessarily included the theft, the theft finding must be stricken.

DISPOSITION

The true finding for a violation of Penal Code sections 484 and 490.5, theft from a merchant, is reversed. As modified, the judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

MCCONNELL, P. J.

HUFFMAN, J.